

October 20, 2003

**By Hand Delivery**

Kristi Izzo, Secretary to the Board  
New Jersey Board of Public Utilities  
Two Gateway Center – 8<sup>th</sup> Floor  
Newark, New Jersey 07102

Re: I/M/O the Board's Investigation Into Jersey Central Power & Light  
Company's Outages of July 4, 2003, Weekend  
BPU Docket No. EX03070503

Dear Secretary Izzo:

Enclosed please find an original and ten copies of this letter motion seeking to compel Jersey Central Power and Light Company ("JCP&L" or the "Company") to provide:

- 1.) responses to all of the Division of the Ratepayer Advocate's ("Ratepayer Advocate") discovery requests in the captioned matter;
- 2.) full and complete copies of JCP&L's responses to Board Staffs' discovery requests; and
- 3.) full and complete copies of all documents and data provided by JCP&L to the Special Reliability Master appointed to investigate JCP&L's reliability performance.

Please stamp and date the copy as filed and return in the enclosed envelope. Thank you for your consideration and assistance in this matter.

**Preliminary Statement**

On October 2, 2003, the Ratepayer Advocate served on JCP&L fourteen discovery requests in the above captioned matter. (attached hereto as Exhibit A). This letter brief in support of the Ratepayer Advocate's motion to compel is being filed in response to a letter in which the Company "inform[ed]" this office that "JCP&L will not respond to the Advocate's discovery requests in this matter." (October 8, 2003 letter from Gerald W. Conway, Esq. to Ami Morita, Esq. attached hereto as Exhibit B).

The Company's refusal to respond to the Ratepayer Advocate's discovery requests in this matter will adversely impact the ability of this office to fulfill our statutory mandate to protect New Jersey ratepayers. As the result of the catastrophic failure of the JCP&L transmission system over the July 4, 2003 weekend, the Board ordered an investigation into the outages and took the extraordinary step of appointing a Special Reliability Master to investigate the Company's on-going reliability problems. It is anticipated that the results of those investigations will be considered in the Company's Phase II proceeding. Accordingly, in order to provide input from the Ratepayer Advocate to the Special Reliability Master and to protect the interests of New Jersey ratepayers, the Ratepayer Advocate hired an engineering expert to review documents and help prepare discovery in this matter. The discovery at issue narrowly focused on the engineering aspects of the July 4, 2003 outages. The Company's refusal to answer these questions is without legal basis and the Ratepayer Advocate respectfully requests that the Board direct JCP&L to provide responses to the Ratepayer Advocate's discovery requests, copies of responses to Board Staff's discovery requests, and copies of all documents and data provided to the Special Reliability Master.

**Argument**

**1. The Findings of the Special Master Could Have a Significant Impact on the Company's Rates.**

The Ratepayer Advocate "represents the financial interests of customers in matters relating to utility rates and policy." *In re N.J.-Am. Water Co.*, 333 N.J.Super. 398, 410, 755 A.2d 1192 (App.Div. 2000). See generally Executive Reorganization Plan No. 001-1994, reprinted in *N.J.S.A.* 13:1D-1 (outlining function of Ratepayer Advocate and comparing it to predecessor, Office of Rate Counsel). The Ratepayer Advocate is "empowered to represent, protect, and advance the interests of all consumers of utility services, including residential, small business, commercial, and industrial ratepayers, in an effort to protect and promote the economic interests of all New Jersey ratepayers." *Ibid.* Both the Board's investigation of the July 4, 2003 outages and the findings of the Special Reliability Master could potentially have a significant impact on JCP&L's rates and JCP&L's customers. Therefore, the Ratepayer Advocate, as a statutory intervenor, is entitled to full participation in all aspects of this proceeding, including the right to propound discovery and to receive copies of all documents provided to all parties in this proceeding.

In the Company's recent deferred balance/base rate case, the Ratepayer Advocate expressed concerns regarding the Company's on-going reliability problems and the provision of safe, adequate and proper service. The Ratepayer Advocate filed the testimony of two expert witnesses who each reviewed innumerable documents regarding the Company's reliability performance and practices. In that case, the Ratepayer

Advocate proposed service quality measures that could be instituted in New Jersey and called for the imposition of automatic penalties for the utility's failure to meet those standards.

In the resulting deferred balance/base rate case Summary Order,<sup>1</sup> the Board recognized the reliability concerns expressed by the Ratepayer Advocate. The Board noted that in a separate docket the Board had ordered an investigation into the July 4, 2003 outage and the appointment of a Special Reliability Master to address the continuing reliability problems in JCP&L's service territory. The Board then, in the Summary Order, directed a Phase II proceeding to review whether the Company was in compliance with current standards and to establish additional standards for JCP&L with specific reliability and performance targets. The Board anticipated that "the results of the current ongoing reviews and focused audits, including the review of the Special Reliability Master, will be merged with the Phase II proceeding." Summary Order, p.10. The Board further noted that any "expenditures and projects undertaken by JCP&L to increase its system's reliability will be reviewed as part of the Phase II proceeding, to determine their prudence and reasonableness for rate recovery." *Id.*

Also in the Summary Order, the Board directed that the Company's allowed return on equity be 9.5% on an interim basis and that this return would be reviewed as

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<sup>1</sup> I/M/O the Verified Petition of Jersey Central Power & Light Company, BPU Docket Nos. ER02080506, ER02080507; EO02070417; ER02030173; ER95120633; Summary Order, dated August 1, 2003. (hereinafter the "Summary Order.")

part of a Phase II proceeding. The Board said:

In the event that JCP&L can demonstrate that it has indeed improved its service quality and reliability, the Board will consider prospectively increasing the return on equity up to 9.75%, similar to the rate or return on equity that it has recently awarded the State's three other electric utilities. However, if as a result of the ongoing and Phase II investigations, it becomes apparent that current reliability standards and requirements have not been met, the Board reserves its rights to take further appropriate actions, including, but not limited to, reducing the return on equity to as low as 9.25%, from the date of this Order. *Summary Order* p. 11.

Thus, the outcome of the Phase II proceeding could have a significant impact on the rates paid by JCP&L customers.

While it is true that the ultimate decision regarding any adjustment to the Company's rates will be made by the Board in the Phase II proceeding, it is anticipated that the findings coming out of the Board's investigation in this docket will become part of the record upon which the Board will base its decision in the Phase II proceeding. The Ratepayer Advocate's ability to review, in a timely manner, the requested information is crucial to fulfill our mandate to protect the interest of JCP&L's ratepayers. Furthermore, the full involvement of the Ratepayer Advocate at this juncture will help expedite the Phase II proceeding. Accordingly, the Ratepayer Advocate respectfully requests that the Board order the Company to provide responses to Ratepayer Advocate discovery, to provide the Ratepayer Advocate with full and complete copies of responses to Board Staff discovery requests, and to provide the Ratepayer Advocate with full and complete copies of all documents provided to the Special Reliability Master.

**2. The Company's Reliance on the Office of Administrative Law ("OAL")  
Discovery Rules is Misplaced and Ignores the Board's Statutory  
Authority to Establish Rules Governing Hearings Before the Board.**

The Company argues that its refusal to respond to Ratepayer Advocate discovery requests is premised on the OAL discovery rules for uncontested cases. The Company claims that, in an uncontested case, it is only required to provide copies of documents and a list of the witnesses "which the party intends to introduce at the hearing." (Letter of October 8, 2003, page 2, citing *N.J.A.C. 1:1-21.2*.) However, the Company's reliance on the cited OAL rule is misplaced and fails to provide an adequate legal basis for the Company's refusal to respond to Ratepayer Advocate's discovery requests.

The Company claims that the OAL has specifically defined an uncontested case "to include 'rulemaking and investigatory hearings.'" (Letter of October 8, 2003, page 2, citing *N.J.A.C. 1:1-21.1(a)*.) In fact, *N.J.A.C. 1:1-21.1(a)* does not **define** an uncontested case as a rulemaking or an investigatory hearing. The regulation merely provides that "[a]ny agency head may request under *N.J.S.A. 52:14F-5(o)* the assignment of an administrative law judge to conduct an uncontested case, including rule making and investigatory hearings." The Company's characterization of this language as the OAL having "specifically defined" an investigation as an uncontested case misses the point.

Both the OAL rules and the Board rules expressly provide that it is the Board that decides if a case is a contested or an uncontested proceeding, not the OAL and not the Company. *N.J.A.C. 1:1-4.1*, *N.J.A.C. 14:1-8.1*, *N.J.A.C. 14:1-9.1*. Thus, for the Company to unilaterally decide that this is an uncontested case and that, therefore, discovery is limited, is not correct.

Furthermore, even if the Board should determine that the investigation of the extraordinary events of July 4, 2003 is an uncontested matter, the Board has the authority to relax the rules of procedure to allow full participation by the Ratepayer Advocate. The OAL rules provide that “[t]his chapter shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.” *N.J.A.C. 1:1-1.3* If the Ratepayer Advocate is denied full participation at this juncture, then these same issues must be again investigated by the Ratepayer Advocate in the Phase II proceedings. This would result in additional complexity in that proceeding, along with the associated expense and delay.

Indeed, the Ratepayer Advocate’s participation in this proceeding will streamline the potentially very complex Phase II proceeding. In the spirit of comity and cooperation, the Ratepayer Advocate has narrowly tailored our initial discovery requests in this matter to fourteen very specific engineering issues concerning the July 4, 2003 outage, the primary focus of this docket. These questions have been crafted to assist, not hinder, the Board’s investigation of the July 4, 2003 outages.

Still to be addressed in the Phase II proceeding are other service quality and reliability issues that the Ratepayer Advocate agrees may be more appropriate in the subsequent proceeding, including, but not limited to, outage information provided to municipalities, responses to customer calls and the performance of the Outage Management System (“OMS”). Therefore, the questions at issue here were tailored to save time by only addressing specific engineering issues arising out of the July 4, 2003 outages. Other reliability issues will be fully addressed in the Phase II proceeding.

In summary, it is well within the Board's discretion in this instance to relax the rules of procedure and order the Company to provide the Ratepayer Advocate with responses to its discovery requests and to provide copies of all information provided in the discovery process to Board Staff and to the Special Reliability Master.

**3. The Company's Concerns Regarding Lack of Adequate Staff Are Yet Another Example of the Company's Troubling Management Style.**

The Company further claims that the Ratepayer Advocate's fourteen questions will place an undue burden on the Company and that the Company does not have adequate staff to "keep the lights on" and to answer the Ratepayer Advocate's discovery questions at the same time. (Letter of October 8, 2003, page 3.) The Ratepayer Advocate asked fourteen narrowly tailored questions about the engineering issues related to the July 4, 2003 outages. For the Company to claim that it does not have adequate staff to answer these questions is hard to believe. New Jersey ratepayers provide the Company with sufficient revenue to provide adequate service. Surely, adequate service includes both keeping the lights on and supporting reliability investigations simultaneously.

The Board has long been concerned with the Company's staffing levels. In the Board investigation of the 1999 outages, the Board directed the Company to "re-examine its workforce adequacy." *I/M/O the Board's Review and Investigation of GPU Energy Electric Utility System's Reliability*, Order, BPU Docket No. EA99070485, May 1, 2001. This concern was repeated in the Board's Order approving the GPU merger with FirstEnergy. The Board noted:



Specifically, the Board is concerned about the merger's effect on JCP&L personnel and the utility's continued local presence in New Jersey in order to meet the Board mandated reliability directives. These directives include retention not only of the unionized workforce, but various GPU staff and key government and regulatory liaisons, who have been, and continue to be involved in the reliability investigations.

*I/M/O of the Joint Petition of FirstEnergy Corp. and Jersey Central Power & Light Company D/B/A GPU Energy, For Approval of a Change in Ownership and Acquisition of Control of a New Jersey Public Utility and Other Relief*, Order, p.24, BPU Docket No. EM0110870, October 9, 2001.

Furthermore, FirstEnergy committed, in the merger proceeding, to "replace individual service employees who either retire or resign, to the extent deemed necessary by management, to ensure that reliability requirements are met." *Id.* at 25.

More recently, in a proceeding addressing the Company's outages in August 2003, the Company agreed to increase the New Jersey work force in reliability areas by 40 and to stabilize the number of the existing workforce. *I/M/O The Board's Investigation Into JCP&L's Storm Related Outages of August 2002*, Order Adopting Staff's Final Report and Approving Stipulation and Agreement of Settlement, BPU Docket No. EX02120950, March 13, 2002.

And yet, despite the years of Board focus on the Company's workforce levels and the Company's repeated assurances, JCP&L is now claiming that it does not have adequate staff to respond to pertinent discovery questions from the Ratepayer Advocate without adversely affecting system reliability. The Company has repeatedly assured the Board that it will maintain adequate staffing levels necessary to service its New Jersey customers. This promise must be read to include adequate staff to support reliability investigations and to keep the lights on at the same time.

**4. The Company's Assertion That Providing This Information to The Ratepayer Advocate Will Result in the "Inadvertent" Release of This Confidential Information Is Without Foundation.**

Finally, the Company cites "significant security concerns" and worries that if these materials were to be provided to the Ratepayer Advocate, efforts "to protect against the inadvertent public release or other dissemination of sensitive information may be seriously compromised." (Letter of October 8, 2003, page 4.) The Company argues that if the Ratepayer Advocate has copies of materials provided to the Special Master, "such material may become subject to requests under the Open Public Records Act for disclosure as public records."

The Open Public Records Act, *N.J.S.A. 47:1A-1 et seq.* ("OPRA") was enacted to further the State's public policy in maintaining open government, not to protect a utility from disclosing documents to a statutory intervenor in the course of a reliability investigation. If any documents provided by the Company are indeed entitled to protection from dissemination, whether for security or other reasons, there are legitimate ways for the Company to ensure that the documents remain confidential. Indeed, OPRA expressly excludes from the definition of a government record "emergency or security information or procedures for any building or facility, which, if disclosed, would jeopardize security of the building or facility or persons therein." *N.J.S.A. 47:1A-1.1*. Therefore, for the Company to refuse to provide documents because those documents may then be the subject of an OPRA request thwarts the Governor's and the legislature's intent in enacting this law and should not be condoned by the Board.

**Conclusion**

The Ratepayer Advocate discovery requests in this proceeding are narrowly focused on the engineering aspects of the July 4, 2003 outages. The results of the Board's investigation in this docket will be considered in the Company's Phase II proceeding, a case that could have a significant impact on customers' rates. The Ratepayer Advocate's ability to review, in a timely manner, the requested information is crucial to fulfill the Ratepayer Advocate's mandate to represent New Jersey's ratepayers. Furthermore, OPRA rules adequately protect the Company's avowed security concerns. Accordingly, the Ratepayer Advocate respectfully requests that the Board order JCP&L to provide to the Ratepayer Advocate and its consultant:

- 1) responses to all of the Ratepayer Advocate's discovery requests, and any follow-up questions, in the captioned matter;
- 2.) full and complete copies of all JCP&L's responses to Board Staff's discovery requests; and
- 3.) full and complete copies of all documents and data provided by JCP&L to the Special Reliability Master appointed by the Board to investigate JCP&L's reliability performance.

Respectfully submitted,  
SEEMA M. SINGH, ESQ.  
RATEPAYER ADVOCATE

By: \_\_\_\_\_  
Diane Schulze, Esq.  
Asst. Deputy Ratepayer Advocate

Encl.

C: Service List